

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: ENVIRONMENTAL MANAGEMENT COMMISSION

RULE CITATION: 15A NCAC 02B .0295(g)

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

In (g), page 6 line 12, it is unclear what constitutes a "forested riparian buffer." There is no definition for "forested" and no definition for "riparian buffer." Since attaining this condition is one of the purposes for or goals of engaging in either "enhancement" or "restoration" it has to be clear if it is attained or at least attainable.

One of the dictionary definitions for "forest" is "a dense growth of trees, together with other plants, covering a large area." Having a tree canopy of "less than 25% of the cover" is enough to make an area suitable for a "restoration site." (Definition (b)(13)) It is not clear if having a tree canopy covering 25% or more of the cover constitutes a "forested" site.

"Riparian" by dictionary definition (there is no rule definition for this term) means "of, on or pertaining to the bank of a natural course of water." Ordinarily I would say this is probably sufficient and there would be no need to define this term. That may still be the case – although I do believe that "forested" does need clarification. However since there is a definition for determining a "riparian wetland" not by its characteristics as "riparian" or "wetland" but by where it is located, e.g. "in a geomorphic floodplain," this may be true for a "riparian buffer" as well.

In (g)(6)(B), page 7 lines 16 and 17, it is unclear whether in approving alternative plans the division is permitted to waive the requirements of (c) or merely the requirements in this sub-sub-paragraph. In either case the goal or purpose of this part of the rule, and what the alternative plan is to be measured against, must be made clear.

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AGENCY: ENVIRONMENTAL MANAGEMENT COMMISSION

RULE CITATION: 15A NCAC 02B .0295(j) – DONATION OF PROPERTY

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

In (j) on page 9 of the rule, it is unclear whether or not an applicant can mix various mitigation possibilities in all cases. ("Mitigation" allows a developer to make up for some of the environmental damage to riparian (shore, river or other waterway) environments a project may cause by taking various steps somewhere else to lessen the overall damage the state suffers.)

Paragraph (c)(1) – (3) (page 3 of the rule) appears to allow an applicant to use any of certain means to mitigate that damage:

(1) The applicant can take physical steps to repair or replace the damage at that site or another site;

(2) The applicant can pay money into a fund; or

(3) The applicant can donate real property to use as a conservation easement.

In (c) lines 19 – 22, the rule states that an applicant can propose "any of [the above] types of mitigation." If the applicant is not permitted to use a mix of the allowed mitigations, then the rule needs to be rewritten to state that "the applicant shall use one of the following forms of mitigation" (or similar language) rather than "any of the following."

This belief that the rule appears to allow a mixture also reappears in (j). In (j)(1) lines 3 – 5 the rule states that donation of real property interests may be used to either "partially or fully satisfy" the payment of a compensatory mitigation fee. That same sub-paragraph, in lines 8 and 9, goes on to say that if the value of the donated property is less than the required fee, the applicant shall "pay the remaining balance due."

However (j)(3)(C) requires that the size of the buffer of donated real property must equal the required mitigation area. That appears to limit the application of (c)(3). The last line of sub-sub-

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paragraph (j)(3)(D) in line 1 at the top of page 10 also requires that “[r]estoration of the [donated] property shall be capable of fully offsetting the adverse impacts of the requested use.” (Emphasis added.) This also appears to limit the application of (c)(3). At any rate both of these provisions certainly make the rule unclear as to whether or not using a mix applies in all cases.

This lack of clarity about exactly what mitigation means are available occurs again in (k)(2)(B) page 13 lines 4 through 6 where precise area requirements for restoration or enhancement projects are set out.